

Jun 15, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JASON F.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-CV-00228-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 22, 23. Attorney Cathy M. Helman represents Jason F. (Plaintiff); Special Assistant United States Attorney Justin L. Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on December 3, 2013, Tr. 144-45, alleging disability since July 15, 2008, Tr. 310, 312, due to a ruptured disc, anxiety, and

1 mental problems, Tr. 391. The applications were denied initially and upon  
2 reconsideration. Tr. 204-07, 209-12. Administrative Law Judge (ALJ) Marie  
3 Palachuk held a hearing on January 21, 2016 and heard testimony from Plaintiff,  
4 psychological expert Nancy Lynn Winfrey, Ph.D., medical expert Allan N. Levine,  
5 M.D., and vocational expert Daniel McKinney. Tr. 47-95. The ALJ issued an  
6 unfavorable decision on February 17, 2016. Tr. 23-37. The Appeals Council  
7 denied review on April 27, 2017. Tr. 1-6. The ALJ's February 17, 2016 decision  
8 became the final decision of the Commissioner, which is appealable to the district  
9 court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for  
10 judicial review on June 20, 2017. ECF Nos. 1, 7.

### 11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the  
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
14 here.

15 Plaintiff was 31 years old at the alleged date of onset. Tr. 310. His highest  
16 level of education was the tenth grade. Tr. 392, 645. He reported his work history  
17 as cashier, cook, customer service representative, security guard, and test driver.  
18 Tr. 392, 398. Plaintiff reported that he stopped working on September 15, 2012  
19 due to his conditions. Tr. 391.

### 20 **STANDARD OF REVIEW**

21 The ALJ is responsible for determining credibility, resolving conflicts in  
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
23 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
24 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
25 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
26 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
27 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
28 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put

1 another way, substantial evidence is such relevant evidence as a reasonable mind  
2 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
3 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
4 interpretation, the court may not substitute its judgment for that of the ALJ.  
5 *Tackett*, 180 F.3d at 1097.

6 If substantial evidence supports the administrative findings, or if conflicting  
7 evidence supports a finding of either disability or non-disability, the ALJ's  
8 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir.  
9 1987). Nevertheless, a decision supported by substantial evidence will be set aside  
10 if the proper legal standards were not applied in weighing the evidence and making  
11 the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
12 433 (9th Cir. 1988).

### 13 SEQUENTIAL EVALUATION PROCESS

14 The Commissioner has established a five-step sequential evaluation process  
15 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
16 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
17 through four, the burden of proof rests upon the claimant to establish a prima facie  
18 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
19 burden is met once the claimant establishes that physical or mental impairments  
20 prevent him from engaging in his previous occupations. 20 C.F.R. §§  
21 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,  
22 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
23 that (1) the claimant can make an adjustment to other work, and (2) specific jobs  
24 which the claimant can perform exist in the national economy. *Batson v. Comm'r*  
25 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant  
26 cannot make an adjustment to other work in the national economy, a finding of  
27 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

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At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since July 15, 2008, the alleged date of onset. Tr. 25.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 26.

the claimant is limited to lifting/carrying a maximum of 15 pounds and standing/walking limited to 30 minutes at a time for a total of five hours per day (requiring the ability to alternate sitting/standing at 30 minute intervals). The claimant is limited to occasional postural activities with the exception of no climbing of ladders, ropes and scaffolds; avoid concentrated exposure to extreme cold and all exposure to hazards such as dangerous moving machinery and unprotected heights. The claimant is able to maintain attention/concentration for two-hour intervals during a regular 40-hour workweek; no production rate (fast-paced assembly-type work); no high pressure/confrontation type job (e.g., customer service/disputes, collection, etc.); no crowds; only occasional interaction with coworkers/supervisors.

Tr. 28. The ALJ identified Plaintiff's past relevant work as store cashier, laborer stores, electronics tester, cook helper, hand packager, and customer-service clerk (CST) and concluded that Plaintiff was not able to perform this past relevant work.

Tr. 35.

1 At step five, the ALJ determined that, considering Plaintiff's age, education,  
2 work experience and residual functional capacity, and based on the testimony of  
3 the vocational expert, there were other jobs that exist in significant numbers in the  
4 national economy Plaintiff could perform, including the jobs of bagger, garment  
5 sorter, and table worker. Tr. 36. The ALJ concluded Plaintiff was not under a  
6 disability within the meaning of the Social Security Act at any time from July 15,  
7 2008, through the date of the ALJ's decision. Tr. 37.

## 8 ISSUES

9 The question presented is whether substantial evidence supports the ALJ's  
10 decision denying benefits and, if so, whether that decision is based on proper legal  
11 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the  
12 opinion evidence, (2) failing to properly address Plaintiff's symptom statements,  
13 and (3) failing to make a proper step five determination.

## 14 DISCUSSION

### 15 1. Opinion Evidence

16 Plaintiff argues that the ALJ failed to properly consider and weigh the  
17 opinions expressed by William M. Shanks, M.D., Benjamin W. Simpson, M.D.,  
18 Wilfred Madarang, M.D., Mahlon Dalley, Ph.D., Frank Rosekrans, Ph.D., Jay M.  
19 Toews, Ed.D., Nancy Lynn Winfrey, Ph.D., Allan N. Levine, M.D., and Helen  
20 Franklin. ECF No. 14 at 22 at 12-20.

21 In weighing medical source opinions, the ALJ should distinguish between  
22 three different types of physicians: (1) treating physicians, who actually treat the  
23 claimant; (2) examining physicians, who examine but do not treat the claimant;  
24 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
25 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more  
26 weight to the opinion of a treating physician than to the opinion of an examining  
27 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ  
28 should give more weight to the opinion of an examining physician than to the

1 opinion of a nonexamining physician. *Id.*

2 When a treating physician's opinion is not contradicted by another  
3 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.  
4 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating  
5 physician's opinion is contradicted by another physician, the ALJ is only required  
6 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*  
7 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining  
8 physician's opinion is not contradicted by another physician, the ALJ may reject  
9 the opinion only for "clear and convincing" reasons, and when an examining  
10 physician's opinion is contradicted by another physician, the ALJ is only required  
11 to provide "specific and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d  
12 at 830-31.

13 The specific and legitimate standard can be met by the ALJ setting out a  
14 detailed and thorough summary of the facts and conflicting clinical evidence,  
15 stating her interpretation thereof, and making findings. *Magallanes v. Bowen*, 881  
16 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer her  
17 conclusions, she "must set forth [her] interpretations and explain why they, rather  
18 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.  
19 1988).

20 **A. William M. Shanks, M.D.**

21 On July 12, 2012, Dr. Shanks completed an examination of Plaintiff at the  
22 request of the Washington Department of Social and Health Services (DSHS) and  
23 diagnosed Plaintiff with widespread degenerative disk disease of the lumbar spine  
24 with facet joint arthritis and a history of left lateral disc herniation at the LS level,  
25 status post-op discectomy at this level. Tr. 582-85. Dr. Shanks completed his  
26 evaluation with the following statement:

27 He has no training in a sedentary level occupation, except for that which  
28 he did in a call center several years ago. He would not be able to return

1 to the heavier types of work he has done in the past. He therefore does  
2 not appear capable of employment at this point.

3 Tr. 585. He also completed a form for DSHS opining that Plaintiff could sit for  
4 most of the day, could lift a maximum of ten pounds, and could frequently lift two  
5 pounds. Tr. 580-81. The ALJ gave the opinion “little weight” for three reasons:  
6 (1) it was a DSHS evaluation, (2) Dr. Shanks is not a vocational expert, but his  
7 opinion contained vocational matters, and (3) it was inconsistent with the  
8 assessments of Dr. Levine, Dr. Madarang, and the State agency medical  
9 consultants. Tr. 33-34.

10 The ALJ’s first reason for rejecting the opinion, that it was a DSHS  
11 evaluation, is not legally sufficient. The ALJ stated that as a preliminary matter,  
12 she “assigns less weight to DSHS evaluations because DSHS uses different  
13 regulations to determine an applicant’s eligibility for benefits, and the evaluations  
14 conducted for DSHS are largely based on the claimant’s self-reported symptoms  
15 and complaints while the claimant is not fully credible in this case.” Tr. 33. This  
16 is legally insufficient for two reasons: First, while the ALJ is accurate that DSHS  
17 uses different rules to establish eligibility for benefits, she is not required to adopt  
18 this agency’s conclusion. 20 C.F.R. §§ 404.1527(d), 416.927(d). However, she is  
19 required to consider the underlying medical opinion that the agency’s conclusion is  
20 based upon. 20 C.F.R. §§ 404.1527(c), 416.927(c). Although the two agencies’  
21 rules may be different, it is not always apparent that these differences affect a  
22 particular physician’s report without further analysis by the ALJ. There may be  
23 situations where less weight should be assigned to a DSHS medical opinion based  
24 on the differences in the rules, but substantial evidence does not support that  
25 finding here. Dr. Shanks’ opinion addressed discrete functional abilities that are  
26 separate from the agency’s conclusions: Plaintiff could sit for most the day, could  
27 lift a maximum of ten pounds, and could frequently lift two pounds. Tr. 580. The  
28 different regulations used by the different agencies have no effect on the functional

1 limitations opined. Therefore, this is not a specific and legitimate reason for  
2 rejecting DSHS medical reports.

3 Second, the blanket conclusion that DSHS evaluations are largely based on a  
4 claimant's self-reported symptoms, is not consistent with Ninth Circuit case law.  
5 A doctor's opinion may be discounted if it relies on a claimant's unreliable self-  
6 report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti v.*  
7 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). But the ALJ must provide the basis  
8 for her conclusion that the opinion was more heavily based on a claimant's self-  
9 reports than the medical evidence. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th  
10 Cir. 2014). Here, the fact that an opinion was penned at the request of an agency is  
11 not a sufficient basis for the ALJ's conclusion that the opinion was based on  
12 Plaintiff's self-reports under *Ghanim*. Therefore, the mere fact that the opinion  
13 was part of Plaintiff's application for DSHS benefits is not a specific and  
14 legitimate reason to reject it.

15 The second reason for rejecting Dr. Shanks' opinion, that he opined on  
16 vocational matter without expertise in that area, is not a specific or legitimate  
17 reason to reject the opinion. The statement at the end of Dr. Shanks' evaluation,  
18 addressing Plaintiff's past work and finding that Plaintiff did not appear capable of  
19 work, Tr. 585, does address vocational issues and the ultimate issue of disability.  
20 Whether or not a claimant is disabled is an issue reserved for the ALJ and is,  
21 therefore, not a medical opinion and not due any special significance. 20 C.F.R. §§  
22 404.1527(d); 416.927(d). While Dr. Shanks' conclusory statement at the end of  
23 his evaluation may address vocational issues and the ultimate issue of disability, it  
24 does not negate his functional opinion contained on the DSHS form, which  
25 addressed Plaintiff's ability to stand and lift. Tr. 580. Therefore, this is not a  
26 legally sufficient reason to reject the functional portion of Dr. Shanks' opinion.

27 The ALJ's third reason for rejecting Dr. Shanks' opinion, that it is  
28 inconsistent with the assessments of Dr. Levine, Dr. Madarang, and the State



1 agency consultants, meets the specific and legitimate standard. An ALJ may reject  
2 an opinion because it conflicts with another physician's examination. *Batson*, 359  
3 F.3d at 1195. Dr. Levine was the medical expert who testified at Plaintiff's  
4 hearing. Tr. 51-66. He and the State agency medical consultants are considered  
5 nonexamining opinions. "The opinion of a nonexamining physician cannot by  
6 itself constitute substantial evidence that justifies the rejection of the opinion of  
7 either an examining physician or a treating physician." *Lester*, 81 F.3d at 831  
8 citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). However, the ALJ  
9 also found that Dr. Shanks' opinion was inconsistent with that of Dr. Madarang.  
10 Tr. 34. Dr. Madarang was an examining physician who provided an opinion  
11 limiting Plaintiff to light work. Tr. 552-56. Therefore, the ALJ did not rely on the  
12 opinions of nonexamining physicians alone in rejecting Dr. Shanks' opinion. As  
13 such, this third reason meets the specific and legitimate standard.

14 **B. Benjamin W. Simpson, M.D.**

15 On November 25, 2015, Dr. Simpson completed a medical source statement  
16 opining that Plaintiff could frequently lift up to ten pounds, occasionally lift and/or  
17 carry eleven to twenty pounds. Tr. 815. Plaintiff could sit at one time for eight  
18 hours, stand at one time for two hours, and walk at one time for three hours. Tr.  
19 816. Plaintiff could bilaterally reach overhead and push/pull occasionally and  
20 reach and finger continuously. Tr. 817. Plaintiff could continuously operate foot  
21 controls bilaterally. *Id.* He could occasionally climb stairs, ramps, ladders, or  
22 scaffolds and was precluded from stooping, kneeling, crouching, and crawling. Tr.  
23 818. His exposure to unprotected heights was limited to occasional and all  
24 remaining environmental considerations were without limitations. Tr. 819. Dr.  
25 Simpson stated that these limitations have lasted or will last for twelve consecutive  
26 months. Tr. 820. The ALJ gave "some weight" to the lift/carry limitations opined  
27 by Dr. Simpson and "little weight" to the remainder of the opinion. Tr. 34. The  
28 ALJ supported the weight provided with two reasons: (1) there was no evidence to

1 support any right upper extremity limitations and (2) the opinion was inconsistent  
2 with that of Dr. Levine and Dr. Madarang. Tr. 35.

3 The ALJ's first reason, that there were no objective findings to support any  
4 ongoing right upper extremity limitations, meets the specific and legitimate  
5 standard. Plaintiff concedes that the right sided limitations are unsupported, but  
6 argues that this only affects the reliability of Dr. Simpson's opinion as to the  
7 limitations on Plaintiff's right side. ECF No. 22 at 16. The Court disagrees. The  
8 fact that a source would opine limitations that are unsupported by the record and  
9 his own treatment notes calls the reliability of the entire opinion into question. *See*  
10 *Batson*, 359 F.3d at 1195 (inconsistency with the majority of the objective  
11 evidence is a specific and legitimate reason for rejecting an opinion).

12 The ALJ's second reason for assigning Dr. Simpson's opinion less weight,  
13 that it was inconsistent with the opinions of Dr. Levine and Dr. Madarang, meets  
14 the specific and legitimate standard. As discussed above, an opinion's  
15 inconsistency with other opinions in the record is a legally sufficient reason to  
16 reject it. Furthermore, Plaintiff only challenges this reason by asserting that the  
17 opinions of nonexamining providers do not constitute substantial evidence in  
18 rejecting the opinion of examining providers. ECF No. 22 at 14 *citing Lester*, 81  
19 F.3d at 831. However, Dr. Madarang was an examining provider. Therefore,  
20 Plaintiff's reliance on *Lester* is misplaced.

21 The ALJ did not error in his treatment of Dr. Simpson's opinion.

22 **C. Wilfred Madarang, M.D.**

23 Dr. Madarang examined Plaintiff on February 27, 2013 and completed an  
24 evaluation form for DSHS. Tr. 539-41, 552-56. He diagnosed Plaintiff with disc  
25 degeneration in the lumbar spine, chronic knee pain, and arthralgia of the left hip.  
26 Tr. 553. He limited Plaintiff to light work and estimated that this limitation would  
27 persist with available medical treatment for six to nine months. Tr. 541, 554. The  
28 ALJ gave the opinion "significant weight," stating that Dr. Madarang had the

1 opportunity to examine Plaintiff, that his opinion was well supported by the  
2 objective medical evidence, and that the opinion was consistent with the testimony  
3 of Dr. Levine. Tr. 33.

4 Plaintiff challenges the ALJ's determination giving controlling weight to Dr.  
5 Madarang's opinion. ECF No. 22 at 17-18. He argues that the ALJ was  
6 inconsistent: First the ALJ rejected other opinions in the record because they were  
7 generated in the pursuit of DSHS benefits, yet she accepted Dr. Madarang's  
8 opinion, which was also generated in the pursuit of DSHS benefits; second, the  
9 ALJ rejected other examining physicians' opinions because they were only  
10 examining physicians, yet she accepted Dr. Madarang's opinion citing his status as  
11 an examining physician. *Id.* The ALJ is not required to provide "sufficient  
12 reasons" for according weight to a medical professional, rather the Court reviews  
13 whether the ALJ has provided legally sufficient reasons for rejecting evidence. *See*  
14 *Ramirez v. Shalala*, 8 F.3d 1449, 1453 (9th Cir. 1993). Accordingly, Plaintiff's  
15 argument with respect to Dr. Madarang's opinion is without merit.

16 **D. Mahlon Dalley, Ph.D.**

17 On March 25, 2013, Dr. Dalley completed a psychological evaluation of  
18 Plaintiff at the request of DSHS. Tr. 532-37. He diagnosed Plaintiff with major  
19 depressive disorder, recurrent and generalized anxiety disorder. Tr. 533. He  
20 opined that Plaintiff had a severe limitation in three basic work activities and a  
21 marked limitation in two additional basic work activities. Tr. 534. The ALJ gave  
22 Dr. Dalley's opinion "little weight" for four reasons: (1) it was a DSHS evaluation,  
23 (2) it was a check-the-box form, (3) it was inconsistent with the record, and (4) it  
24 was inconsistent with the opinions of Dr. Winfrey, Dr. Toews, and the State  
25 agency medical consultants. Tr. 34.

26 The ALJ's first reason for rejecting the opinion, that it was a DSHS  
27 evaluation, fails to meet the specific and legitimate standard. The ALJ found that  
28 DSHS evaluations are assigned less weight because DSHS uses different

1 regulations, the evaluations are largely based on the claimant's self-reported  
2 symptoms, and claimants have an incentive to overstate symptoms and complaints.  
3 Tr. 34. The ALJ's first two of these three assumptions regarding DSHS  
4 evaluations, that they are premised on different regulations and based on the  
5 claimant's self-reports, were the same blanket reasons for rejecting Dr. Shanks'  
6 opinion, and are not specific and legitimate. *See supra*. The third assumption the  
7 ALJ made about DSHS opinions, that claimants have an incentive to overstate their  
8 limitations for the receipt of benefits, is not supported by substantial evidence. Dr.  
9 Dalley specifically stated that Plaintiff's "motivation appeared appropriate and the  
10 test results are believed to be a good indication of his current cognitive and  
11 psychological functioning." Tr. 535. Dr. Dalley administered the Minnesota  
12 Multiphasic Personality Inventory (MMPI-2) and concluded that the validity  
13 indicators suggested that Plaintiff's profile was valid. Tr. 537. Therefore, any  
14 finding that Plaintiff was misrepresenting the severity of his impairments for the  
15 receipt of benefits during Dr. Dalley's evaluation is not supported by the record.  
16 The fact that Dr. Dalley's evaluation was a DSHS evaluation is not a legally  
17 sufficient reason to reject it.

18       The ALJ's second reason for rejecting Dr. Dalley's opinion, that it was  
19 contained on a check-the-box form, does not meet the specific and legitimate  
20 standard. The Ninth Circuit has expressed a preference for narrative opinions over  
21 opinions expressed on a check-the-box form. *See Murray*, 722 F.2d at 501.  
22 However, check-the-box forms that do not stand alone, but are supported by  
23 records should be "entitled to weight that an otherwise unsupported and  
24 unexplained check-box form would not merit." *Garrison v. Colvin*, 759 F.3d 995,  
25 1013 (9th Cir. 2014). Here, there are not hundreds of pages of treatment records in  
26 support of Dr. Dalley's check-the-box form as there were in *Garrison*, however,  
27 there is a mental status examination, a clinical interview, and psychological testing.  
28 Tr. 532-37. The ALJ did not find Dr. Dalley's report inconsistent with his opinion.

1 Therefore, the fact that the opinion was expressed on a check-the-box form is not a  
2 sufficient reason to reject it.

3 The ALJ's third and fourth reasons for rejecting the opinion, that it was  
4 inconsistent with Plaintiff's reports throughout the record and inconsistent with the  
5 opinions of Dr. Winfrey, Dr. Toews, and the State agency medical consultants,  
6 meet the specific and legitimate standard. An ALJ may reject an opinion because  
7 it is inconsistent with other statements and assessments of the claimant's medical  
8 condition. *Batson*, 359 F.3d at 1195. The ALJ found that Plaintiff's own reports  
9 of mild mental health symptoms to other providers throughout the record were  
10 inconsistent with the severity of impairments opined by Dr. Dalley. Tr. 34. She  
11 cited five locations in the record in which Plaintiff reported improvement in his  
12 psychiatric symptoms, Tr. 593-94, 682, a lack of symptoms, Tr. 678, or Depression  
13 and Anxiety Scales showing minimal symptoms, Tr. 674, 676. It is reasonable for  
14 the ALJ to question the reliability of Dr. Dalley's evaluation considering Plaintiff  
15 failed to consistently allege the level of severity of symptoms that Dr. Dalley  
16 opined as present. Furthermore, Plaintiff does not challenge the ALJ's finding that  
17 his statements were inconsistent with Dr. Dalley's evaluation. *See Carmickle v.*  
18 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (The Court  
19 need not address issues not specifically raised in briefing).

20 Plaintiff challenges the ALJ's finding that the opinions were inconsistent  
21 with the opinions of Dr. Winfrey, Dr. Toews, and the State agency medical  
22 consultants. ECF No. 22 at 14. However, his challenge only addresses the  
23 opinion's inconsistency with nonexamining providers. *Id.* Dr. Winfrey and the  
24 State agency medical consultants are nonexamining providers. Plaintiff is accurate  
25 that the opinion of a nonexamining physician cannot by itself constitute substantial  
26 evidence that justifies the rejection of the opinion of either an examining or  
27 treating physician. ECF No. 22 at 14 *citing Lester*, 81 F.3d at 831. However, Dr.  
28 Toews is an examining source, and the ALJ relied upon his opinion when rejecting

1 Dr. Dalley's opinion. Therefore, the ALJ is not relying on nonexamining sources  
2 alone. The ALJ has provided a legally sufficient reason to reject Dr. Dalley's  
3 opinion.

4 **E. Frank Rosekrans, Ph.D.**

5 Dr. Rosekrans completed a psychological evaluation for DSHS on January  
6 20, 2014. Tr. 645-53. He diagnosed Plaintiff with major depressive disorder,  
7 single episode, mild and generalized anxiety disorder. Tr. 646. He opined that  
8 Plaintiff had a marked limitation in four basic work activities and a moderate  
9 limitation in two additional basic work activities. Tr. 647. He stated that Plaintiff  
10 would be impaired with available treatment for sixty months. *Id.* The ALJ gave  
11 Dr. Rosekrans' opinion "little weight" for three reasons: (1) it was a DSHS  
12 opinion; (2) it was inconsistent with the medical records; and (3) it was  
13 inconsistent with the assessments of Dr. Winfrey, Dr. Toews, and State agency  
14 medical consultants. Tr. 34.

15 The ALJ's first reason for rejecting Dr. Rosekrans' opinion, that it was a  
16 DSHS evaluation, fails to meet the specific and legitimate standard. The ALJ  
17 assigned less weight because DSHS uses different regulations, the evaluations are  
18 largely based on the claimant's self-reported symptoms, and claimants have an  
19 incentive to overstate symptoms and complaints in DSHS evaluations. Tr. 34.  
20 These three reasons are identical to those used to reject the opinion of Dr. Dalley,  
21 and, as discussed at length above, are not sufficient to support the ALJ's rejection  
22 of the opinion. *See supra.* Here, like in the case of Dr. Dalley's opinion, the  
23 ALJ's conclusion that Plaintiff was overstating his symptoms is not supported by  
24 substantial evidence because Dr. Rosekrans found he had a valid score on the  
25 Personality Assessment Inventory. Tr. 646.

26 The ALJ's second and third reasons for rejecting Dr. Rosekrans' opinion,  
27 that it was inconsistent with the medical evidence and the opinions of Dr. Winfrey,  
28 Dr. Toews, and State agency medical consultants, are legally sufficient. The ALJ

1 relies on the same reports of mild mental health symptoms relied upon in the  
2 rejection of Dr. Dalley's opinion and also cites to mild mental status findings  
3 throughout the record. Tr. 34. An ALJ may reject an opinion because it is  
4 inconsistent with the objective medical evidence, including other physicians'  
5 examinations. *Batson*, 359 F.3d at 1195. The ALJ relied on Dr. Madarang's  
6 observation that Plaintiff had "[n]o unusual anxiety or evidence of depression" at  
7 the time of his February 27, 2013 evaluation. Tr. 34 (*citing* Tr. 540). The ALJ  
8 also relied upon Dr. Madarang's June 14, 2013 evaluation finding that Plaintiff  
9 was "not anxious, and does not have suicidal ideation." Tr. 34 (*citing* Tr. 594).  
10 However, it appears the ALJ overlooked records from the same day showing that  
11 Plaintiff had moderate depressive symptoms on the PHQ-9 Depression Scale. Tr.  
12 591. The ALJ also relied upon Dr. Madarang's normal observations on June 27,  
13 2013, July 3, 2013, and September 13, 2013. Tr. 34 (*citing* Tr. 601, 608, 612).  
14 However, at Plaintiff's follow up with Shannon Dickens on June 27, 2013,  
15 September 6, 2013, and September 27, 2013, he continued to have moderate and  
16 severe scores on his PHQ-9 Depression Scale. Tr. 604, 609, 614. Plaintiff asserts  
17 that the record supports Dr. Rosekrans' opinion. ECF No. 22 at 17. The evidence  
18 in the record is conflicting. The evidence cited by the ALJ supports her  
19 determination, and the evidence cited by Plaintiff supports Dr. Rosekrans' opinion.  
20 If the evidence is susceptible to more than one rational interpretation, the court  
21 may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097.  
22 Therefore, the Court will not disturb the ALJ's determination that the medical  
23 evidence in the file did not support Dr. Rosekrans' opinion.

24 Plaintiff also challenges the ALJ's finding that the opinion was inconsistent  
25 with that of Dr. Winfrey, Dr. Toews, and the State agency medical consultants.  
26 ECF No. 22 at 14. However, his challenge only addresses Dr. Rosekrans'  
27 opinion's inconsistency with nonexamining providers. Here, Dr. Winfrey and the  
28 State agency medical consultants are nonexamining providers. Plaintiff is correct

1 that the opinion of a nonexamining physician cannot by itself constitute substantial  
2 evidence that justifies the rejection of the opinion of either an examining or  
3 treating psychologist. ECF No. 22 at 14 *citing Lester*, 81 F.3d at 831. However,  
4 Dr. Toews is an examining source who the ALJ relied upon when rejecting Dr.  
5 Rosekrans' opinion. *See* Tr. 34. The ALJ did not rely on nonexamining sources  
6 alone. As such, the ALJ has provided a legally sufficient reasons to reject Dr.  
7 Rosekrans' opinion.

8 **F. Jay M. Toews, Ed.D.**

9 On February 27, 2014, Dr. Toews completed a consultative examination of  
10 Plaintiff at the request of the Disability Determination Services (DDS). Tr. 633-  
11 38. He diagnosed Plaintiff with a mood disorder and an anxiety disorder. Tr. 637.  
12 He also found that Plaintiff had probable dependent traits. *Id.* In his summary, Dr.  
13 Toews stated that Plaintiff "appears poorly motivated to consider employment or  
14 employment training." *Id.* He opined that Plaintiff functions in the low average to  
15 average range of intelligence, had no mood or affective barriers to employability,  
16 could remember multi-step instructions and detailed instructions, could have at  
17 least superficial interactions with coworkers and supervisors, and may have  
18 moderate difficulties interacting with the general public. *Id.* The ALJ gave this  
19 opinion some weight, but gave controlling weight to the opinion of Dr. Winfrey.  
20 Tr. 33.

21 Plaintiff challenges the weight the ALJ assigned to Dr. Toews' opinion  
22 based on his credentials. ECF No. 22 at 18-19. He argues that Dr. Toews is not  
23 qualified to be a psychological consultant under 20 C.F.R. § 404.1616(d). *Id.* A  
24 psychological consultant "is a member of a team that makes disability  
25 determinations in a State agency (see § 404.1615), or who is a member of a team  
26 that makes disability determinations for us when we make disability  
27 determinations ourselves." 20 C.F.R. § 404.1616(c). Disability determinations at  
28 the initial and reconsideration levels are made by a State agency. *See* 20 C.F.R. §§



1 404.930(a) (reconsideration denials can be appealed to an ALJ); 404.1503 (State  
2 agencies make disability determinations for the Commissioner). Therefore, the  
3 psychological consultants would have been Dan Donahue, Ph.D. and James Bailey,  
4 Ph.D., who reviewed Plaintiff's file at the initial and reconsideration levels,  
5 respectively. Tr. 152, 163, 176, 188.

6 Dr. Toews completed a consultative examination of Plaintiff at the request  
7 of the State agency. Tr. 633. "A consultative examination is a physical or mental  
8 examination or test purchased for you at our request and expense from a treating  
9 source or another medical source." 20 C.F.R. §§ 404.1519, 416.919. Regulations  
10 require that a consultative examiner be a "qualified medical source." 20 C.F.R. §§  
11 404.1519g, 416.919g. Qualified is defined as licensed in the state at the time of the  
12 exam. 20 C.F.R. §§ 404.1503a, 404.1519g, 416.903a, 416.919g. A medical  
13 source is defined as "an individual who is licensed as a healthcare worker by a  
14 State and working within the scope of practice permitted under State or Federal  
15 law." 20 C.F.R. §§ 404.1502(d), 416.902(d).

16 Plaintiff's challenge of Dr. Toews' opinion under 20 C.F.R. § 404.1616(d)  
17 fails because Dr. Toews is not presented as a psychological consultant. Dr. Toews  
18 is presented as a consultative examiner. Plaintiff did assert that "there [is] no  
19 evidence that he possesses a doctorate degree in psychology or [is] listed in any  
20 national register of health service providers in psychology." ECF No. 22 at 18. As  
21 a consultative examiner, Dr. Toews was required to be a "qualified medical  
22 source." However, Plaintiff failed to object to Dr. Toews' evaluation at the ALJ  
23 hearing. *See* Tr. 49 (Plaintiff presented no objections to the exhibits being entered  
24 into the record). Additionally, Plaintiff did not raise the issue in any of his briefing  
25 before the ALJ or before the Appeals Council. Tr. 260-64, 447-58. Therefore,  
26 Plaintiff waived any challenge to Dr. Toews' status as a consultative examiner.  
27 *See Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999) (When a claimant is  
28 represented by counsel, claimants must raise all issues and evidence at their

1 administrative hearings in order to preserve them on appeal.”). Therefore, the  
2 Court will not disturb the weight the ALJ assigned to Dr. Toews’ opinion.

3 **G. Nancy Lynn Winfrey, Ph.D. and Allan N. Levine, M.D.**

4 Dr. Winfrey and Dr. Levine testified at Plaintiff’s hearing. Tr. 51-75. Each  
5 provided a residual functional capacity opinion consistent with the ALJ’s residual  
6 functional capacity determination. *Id.* The ALJ gave these opinions significant  
7 weight because Dr. Winfrey and Dr. Levine had an awareness of all the medical  
8 records, they had knowledge of the Social Security disability programs, they were  
9 specialists in their fields, and their opinions were well supported. Tr. 32-33.  
10 Plaintiff challenges the weight provided to these opinions asserting that the ALJ  
11 used boilerplate language when assigning more weight to these opinions. ECF No.  
12 22 at 19. There is no requirement that the ALJ provide “sufficient reasons” for  
13 according weight to a medical professional, rather the Court reviews whether the  
14 ALJ has provided legally sufficient reasons for rejecting evidence. *Garrison*, 759  
15 F.3d at 1020. Plaintiff failed to show that the ALJ erred in weighing the opinions  
16 of Dr. Shanks, Dr. Simpson, Dr. Dalley, and Dr. Rosekrans. *See supra*. The Court  
17 will not disturb the weight provided to Dr. Winfrey’s and Dr. Levine’s opinions.

18 **H. Helen Franklin**

19 On January 20, 2016, Ms. Franklin, a Certified Peer Counselor, wrote a  
20 letter addressing her friendship with Plaintiff and what she had witnessed regarding  
21 his impairments and symptoms. Tr. 445. The ALJ rejected the statements made in  
22 the letter because Ms. Franklin did not have a treating relationship with Plaintiff  
23 and her statements were unsupported by the objective medical evidence. Tr. 35.

24 Ms. Franklin is a Certified Peer Counselor, which is not considered an  
25 acceptable medical source. *See* 20 C.F.R. §§ 404.1502(a), 416.902(a). Therefore,  
26 she is considered an “other source.” An ALJ is required to consider evidence from  
27 “other sources,” 20 C.F.R. §§ 404.1527(f), 416.927(f), “as to how an impairment  
28 affects a claimant’s ability to work,” *Sprague*, 812 F.2d at 1232. An ALJ must

1 give “germane” reasons to discount evidence from “other sources.” *Dodrill v.*  
2 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

3 Plaintiff challenges the ALJ’s rejection of Ms. Franklin’s statements by  
4 asserting that “[t]he ALJ provided no reason other than she did not believe  
5 [Plaintiff].” ECF No. 22 at 20. This assertion is inaccurate. The ALJ provided  
6 two reasons specific to Ms. Franklin’s statements: (1) that Ms. Franklin did not  
7 have a treating relationship with Plaintiff and (2) that the opinion was unsupported  
8 by the objective medical evidence. Tr. 35. Plaintiff failed to challenge these  
9 reasons. ECF No. 22 at 20. As such, the Court is not required to address them.  
10 *See Carmickle*, 533 F.3d at 1161 n.2.

#### 11 **J. Harmless Errors**

12 The ALJ provided at least one reason that meets the required standard for  
13 rejecting each opinion from Dr. Shanks, Dr. Dalley, and Dr. Rosekrans. Therefore,  
14 any error resulting from these legally insufficient reasons would be harmless. *See*  
15 *Tommasetti*, 533 F.3d at 1038 (an error is harmless when “it is clear from the  
16 record that the . . . error was inconsequential to the ultimate nondisability  
17 determination”). The ALJ’s treatment of the opinion evidence did not amount to  
18 harmful error.

#### 19 **2. Plaintiff’s Symptom Statements**

20 Plaintiff contests the ALJ’s determination that Plaintiff’s symptom  
21 statements were less than fully credible. ECF No. 22 at 3-12.

22 It is generally the province of the ALJ to make determinations regarding the  
23 credibility of claimant’s statements, *Andrews*, 53 F.3d at 1039, but the ALJ’s  
24 findings must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903  
25 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the  
26 ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear and  
27 convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81  
28 F.3d at 834. “General findings are insufficient: rather the ALJ must identify what

1 testimony is not credible and what evidence undermines the claimant's  
2 complaints." *Lester*, 81 F.3d at 834.

3 The ALJ found Plaintiff's statements to be less than fully credible  
4 concerning the alleged intensity, persistence, and limiting effects of his symptoms.  
5 Tr. 29. The ALJ reasoned that Plaintiff's statements were less than fully credible  
6 because (1) they were not supported by the medical evidence, (2) they were  
7 inconsistent with his reported activities, (3) they were inconsistent with his  
8 statements, (4) there was evidence of motivation for secondary gain, and (5) they  
9 were inconsistent with his noncompliance with treatment.

### 10 **1. Medical Evidence**

11 The ALJ's first reason for finding Plaintiff's symptom statements less than  
12 fully credible, that his reported symptoms were not supported by medical evidence,  
13 meets the specific, clear, and convincing standard.

14 Although it cannot serve as the sole reason for rejecting a claimant's  
15 credibility, objective medical evidence is a "relevant factor in determining the  
16 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261  
17 F.3d 853, 857 (9th Cir. 2001).

18 The ALJ provided citations to the record supporting her determination that  
19 Plaintiff's reported symptoms from physical and mental impairments were not  
20 supported by the medical evidence. Tr. 29-30 (Finding that a totality of the record  
21 does not support Plaintiff's statements regarding physical symptoms, including  
22 imaging reports and physical examinations); 30-31 (summarizing evidence that his  
23 mental health impairments improved with medication and evaluations were within  
24 normal limits). Plaintiff argues that the ALJ ignored evidence supporting the  
25 severity of his reported symptoms. ECF No. 22 at 4-10. He cites to medical  
26 records that support the severity of symptoms he alleges, and asserts that the  
27 evidence the ALJ cited were are merely "scattered episodes where [Plaintiff] had  
28 good days." *Id.* Here, there is evidence to support the ALJ's determination that

1 Plaintiff's statements regarding the intensity, persistence, and limiting effects of  
2 his symptoms were inconsistent with the medical evidence, and there is medical  
3 evidence to support Plaintiff's statements regarding the intensity, persistence, and  
4 limiting effects of his symptoms. The ALJ's interpretation of the evidence is a  
5 reasonable one, and it is not the Court's role to second-guess it. *See Tackett*, 180  
6 F.3d at 1097; *Sprague*, 812 F.2d at 1230.

## 7       **2.     Reported Activities**

8       The ALJ's second reason for finding Plaintiff's symptom statements less  
9 than fully credible, that Plaintiff's reported activities were inconsistent with his  
10 alleged limitations, meets the specific, clear, and convincing standard.

11       A claimant's daily activities may support an adverse credibility finding if (1)  
12 the claimant's activities contradict his other testimony, or (2) "the claimant is able  
13 to spend a substantial part of his day engaged in pursuits involving performance of  
14 physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639  
15 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). "The ALJ must make  
16 'specific findings relating to [the daily] activities' and their transferability to  
17 conclude that a claimant's daily activities warrant an adverse credibility  
18 determination." *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.  
19 2005)). A claimant need not be "utterly incapacitated" to be eligible for benefits.  
20 *Fair*, 885 F.2d at 603.

21       The ALJ found that Plaintiff "described daily activities that are not limited  
22 to the extent one would expect, given his complaints of disabling symptoms and  
23 limitations." Tr. 32. More specifically, the ALJ found that Plaintiff's "odd jobs"  
24 and being paid "under the table" demonstrated he was more capable than alleged.  
25 *Id.* She found Plaintiff's reported severity of concentration and cognitive issues  
26 was inconsistent with his reported ability to play card games on a daily basis, play  
27 video games, watch movies, and tinker with fixing computers. *Id.* She found  
28 Plaintiff's reported severity of back pain was inconsistent with his reported walks,

1 exercise, bike riding, and working at the Union Gospel Mission unloading  
2 boxes/accepting donations. *Id.*

3 Plaintiff argues that the ALJ failed to show transferability to work activity  
4 under *Orn.* ECF No. 22 at 11. The Court in *Orn* provided two ways to show that a  
5 claimant's activities undermine his symptom statements: (1) showing that a  
6 claimant's activities contradict his other testimony; or (2) showing that a  
7 claimant's activities are transferable to a work setting. 495 F.3d at 639. Here the  
8 ALJ specifically found that Plaintiff's activities were inconsistent with his other  
9 testimony. Tr. 32 (He "described daily activities that are not limited to the extent  
10 one would expect, given his complaints of disabling symptoms and limitations.").  
11 Therefore, she was not required to make any findings as to the transferability to  
12 work activity.

13 Here, the ALJ provided citations to specific activities the Plaintiff reported  
14 performing and found them inconsistent with portions of Plaintiff's testimony. Tr.  
15 32. Therefore, this reason meets the specific, clear and convincing standard.

### 16 **3. Inconsistent Statements**

17 The ALJ's third reason for finding Plaintiff's symptoms statements less than  
18 fully credible was that Plaintiff made inconsistent statements to his providers. Tr.  
19 30, 32.

20 The ALJ may consider "ordinary techniques of credibility evaluation, such  
21 as the claimant's reputation for lying, prior inconsistent statements . . . and other  
22 testimony by the claimant that appears less than candid." *Smolen*, 80 F.3d at 1284.

23 Here, the ALJ found that Plaintiff's reports to DSHS examiners regarding  
24 the severity of his symptoms were inconsistent with his reports to his treating  
25 providers. Tr. 30. Specifically, the ALJ provided repeated examples of Plaintiff  
26 reporting mild mental health symptoms, but she failed to state how these  
27 statements were inconsistent with Plaintiffs' presentations to DSHS examiners. *Id.*  
28 Therefore, these statements do not have the specificity required to meet the

1 specific, clear and convincing standard.

2 Later in the decision, the ALJ found that Plaintiff's testimony that he had not  
3 worked at all since 2012, Tr. 77, was inconsistent with statements that he was  
4 working at the back dock of the Union Gospel Mission accepting donations, Tr.  
5 674, he was working the graveyard shift, Tr. 676, and that he was doing odd jobs  
6 for a friend, Tr. 831. Tr. 32. This finding of inconsistent statements is specific  
7 enough to meet the specific, clear and convincing standard.

#### 8 **4. Secondary Gain**

9 The ALJ's fourth reason for finding Plaintiff's symptoms statements  
10 unreliable, that Plaintiff was motivated by secondary gain, meets the specific, clear  
11 and convincing standard.

12 The Ninth Circuit has held that a claimant's motivation and the issue of  
13 secondary gain may be considered by an ALJ when rejecting symptom testimony.  
14 *See Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998). In *Matney o/b/o Matney v.*  
15 *Sullivan*, the Ninth Circuit found that "set[ting]out specific findings which were  
16 supported by the record, *i.e.* . . . [the claimant]'s testimony regarding his daily  
17 activities, his demeanor and appearance at the hearing, as well as his well  
18 documented motivation to obtain social security benefits," was sufficient to  
19 support a rejection of Plaintiff's symptom statements. 981 F.2d 1016, 1020 (9th  
20 Cir. 1992).

21 Here, the ALJ cited to four records which referenced motivation of  
22 secondary gain, Tr. 31-32: (1) On March 1, 2014, Dr. Toews found that Plaintiff  
23 "appears poorly motivated to consider employment or employment training." Tr.  
24 637; (2) On September 25, 2014, Plaintiff initiated services at Frontier Behavioral  
25 Health (FBH) "because his attorney told him he needed to be seen at FBH in order  
26 to get SSI." Tr. 768; (3) On October 22, 2014 Plaintiff reported to his provider that  
27 he "doesn't want to do anything (work) that my hurt my Social Security case." Tr.  
28 766; and (4) On December 9, 2014, Plaintiff admitted to his provider at he "is

1 avoiding doing volunteer work as he feels it may effect his SSI outcome.” Tr. 758.

2 The ALJ provided repeated examples of Plaintiff being motivated by reasons  
3 not related to improvement in his functional abilities. Therefore, this reason meets  
4 the specific, clear and convincing standard.

## 5 **5. Noncompliance with Treatment**

6 The ALJ’s fifth reason for finding Plaintiff’s symptom statements less than  
7 fully credible, that his alleged severity of symptoms was inconsistent with his  
8 noncompliance with treatment, meets the specific, clear and convincing standard.

9 Noncompliance with medical care or unexplained or inadequately explained  
10 reasons for failing to seek medical treatment casts doubt on a claimant’s subjective  
11 complaints. 20 C.F.R. §§ 404.1530, 416.930; *Fair*, 885 F.2d at 603; *Macri v.*  
12 *Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the ALJ’s decision to reject the  
13 claimant’s subjective pain testimony was supported by the fact that claimant was  
14 not taking pain medication).

15 Here, the ALJ found that Plaintiff refused to attend vocational rehabilitation  
16 training and group therapy. Tr. 32. He canceled or failed to show up for five of  
17 his physical therapy appointments. *Id.* Plaintiff alleges that he was not  
18 noncompliant. ECF No. 22 at 10. He asserts that he experienced a lapse in  
19 treatment between 2012 and 2013 due to financial constraints and that he took a  
20 break in mental health counseling in March 2015 to focus on his physical issues.  
21 *Id.* at 10-11. However, the ALJ’s findings do not pertain to these periods and are  
22 not limited to his mental health treatment. The ALJ first referenced an October  
23 2014 treatment note in which Plaintiff missed group therapy, referred to as “class,”  
24 because he fell asleep and that he planned on missing another class because it was  
25 his birthday and he was going to have lunch with his brother. Tr. 766. The  
26 counselor stated that Plaintiff was “reluctant to attend classes since he does not  
27 believe they will be helpful to him.” *Id.* She also suggested he attend vocational  
28 rehabilitation to see if any employment would be available, and Plaintiff “stated



1 that he tried this ‘a long time ago’ but that he ‘doesn’t want to do anything (work)  
2 that would hurt my Social Security case.’” *Id.* The ALJ’s second citation to the  
3 record addresses Plaintiff’s noncompliance with physical therapy in May and June  
4 of 2013. Tr. 32. An August 2013 Discharge Summary states the following:

5        Jason attended 6 appointments and cancelled of [*sic.*] no showed for 5  
6        appointments. He did work hard during the appointments he attended.  
7        He cancelled or no showed for his last 3 appointments. At the time of  
8        his last scheduled appointment on 7/16/13, he stated he would call us  
9        to schedule further appointments. We have not heard from him, he will  
      be considered discharged at this time.

10 Tr. 587. Plaintiff’s explanation for his lapse in treatment from 2012 to 2013 and  
11 again in 2015 fails to account for the ALJ’s findings that he failed to follow the  
12 recommendations of his counselor in October of 2014 and his failure to complete  
13 physical therapy in May and June of 2013. The evidence the ALJ cited supports  
14 her conclusion that Plaintiff was noncompliant with treatment. Therefore, this  
15 reason meets the specific, clear and convincing standard.

16        In conclusion, the ALJ provided enough specific, clear and convincing  
17 reasons to support her determination that Plaintiff’s symptoms statements were less  
18 than fully credible. *See Carmickle*, 533 F.3d at 1163 (upholding an adverse  
19 credibility finding where the ALJ provided four reasons to discredit the claimant,  
20 two of which were invalid); *Batson*, 359 F.3d at 1197 (affirming a credibility  
21 finding where one of several reasons was unsupported by the record); *Tommasetti*,  
22 533 F.3d at 1038 (an error is harmless when “it is clear from the record that the . . .  
23 error was inconsequential to the ultimate nondisability determination”).

### 24 **3. Step Five**

25        Plaintiff asserts that the ALJ’s finding that he could perform light work was  
26 contrary to the evidence, including the opinions of the treating and examining  
27 sources. ECF No. 22 at 20-21.

28        This step five argument is premised on Plaintiff raising successful

1 challenges to the ALJ's treatment of the opinion evidence in the record. ECF No.  
2 22 at 20-21. The Court has declined to disturb the weight the ALJ assigned the  
3 opinion evidence. *See supra*. Therefore, Plaintiff's step five challenge fails.

#### 4 **CONCLUSION**

5 Having reviewed the record and the ALJ's findings, the Court finds the  
6 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
7 Accordingly, **IT IS ORDERED:**

8 1. Defendant's Motion for Summary Judgment, **ECF No. 23**, is  
9 **GRANTED.**

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 22**, is **DENIED.**

11 The District Court Executive is directed to file this Order and provide a copy  
12 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
13 **and the file shall be CLOSED.**

14 DATED June 15, 2018.

A handwritten signature in black ink, appearing to read "M", is positioned above a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE